(2)

FEB 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 1219

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THOMAS BIELICKI and JACQUELINE BIELICKI,
Petitioners

vs.

PAKISTAN NATIONAL SHIPPING CORPORATION
and
EMPIRE STEVEDORING COMPANY, LTD.,
Respondents

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT EMPIRE STEVEDORING COMPANY, LTD.

THOMAS E. SEUS, ESQUIRE
KELLY, HARRINGTON,
McLAUGHLIN & FOSTER
1700 Atlantic Building
260 South Broad Street
Philadelphia, PA 19102
(215) 790-7900

Counsel for Respondent,
Empire Stevedoring
Company, Ltd.

WINCHELL FINANCIAL Philadelphia, PA 19107
(215) 496-3664

30pp

QUESTIONS PRESENTED FOR REVIEW

WHETHER THIS HONORABLE COURT SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI BECAUSE:

(1) THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA AND THE AFFIRMANCE OF THAT DECISION BY THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ARE IN ACCORD WITH THIS HONORABLE COURT'S DECISION IN *ASAHI METAL INDUSTRY CO., LTD. V. SUPERIOR COURT OF CALIFORNIA, SOLANO COUNTY;*

(2) THERE IS NO REAL CONFLICT BETWEEN THE COURT OF APPEALS FOR THE THIRD CIRCUIT AND THE COURT OF APPEALS FOR THE NINTH CIRCUIT PRESENTED BY THE FACTS OF THE INSTANT CASE; AND

(3) THE UNRESOLVED QUESTION OF WHETHER PERSONAL JURISDICTION OVER A FOREIGN DEFENDANT MAY BE BASED ON THE AGGREGATE OF NATIONAL CONTACTS, RATHER THAN ON THE CONTACTS BETWEEN THE DEFENDANT AND THE STATE IN WHICH THE FEDERAL COURT SITS, MAY ONLY BE RECTIFIED BY CONGRESSIONAL AUTHORIZATION OF NATIONWIDE SERVICE OF PROCESS AND THERE IS NO SUCH STATUTE TO BE CONSTRUED BY THIS HONORABLE COURT.

LIST OF RELATED COMPANIES

Empire Stevedoring Co., Ltd., is a privately-held Canadian corporation. Its parent company, Chodos Investments, Ltd., is likewise privately-held by Canadian citizens. Empire Stevedoring Co., Ltd., has one wholly-owned subsidiary, Empire Stevedoring Co., Inc.

TABLE OF CONTENTS

Item	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
COUNTER STATEMENT OF THE CASE	1
ARGUMENT	2
CONCLUSION	14

TABLE OF AUTHORITIES

Cases Page

Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County, 480 U.S. 102, 107 S. Ct. 1026, 94 L.Ed. 2d 92 (1987) 2, 3, 4, 5, 13, 14

Bielicki v. Pakistan National Shipping Corp. and Empire Stevedoring Co., Ltd., No. 88-1203 (3d Cir. Memorandum of 8-26-88, Mansmann, J.) 3, 4, 5, 11

DeJames v. Magnificence Carriers, Inc., 654 F.2d 280 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981) 3, 8, 9, 11, 12

Federal Trade Commission v. Jim Walter Corp., 651 F.2d 251 (5th Cir. 1981) 11

Friend v. Internor Trade Inc., C.A. No. 86-4073 (E.D. Pa. Memorandum of 3/13/87, Ludwig, J.) (available March 16, 1987, on LEXIS, Genfed Library, Dist. File) 9

Hedrick v. Daiko Shoji Co., Ltd., 715 F.2d 1355 (9th Cir. 1983) 6

Max Daetwyler Corp. v. R. Meyer, 762 F.2d 290 (3d Cir. 1985) 12

Muller v. Temura Shipping Co., Ltd., 629 F.Supp. 1024 (E.D. Pa. 1986) 8, 9

Peters v. Titan Navigation Co., 1985 AMC 2249 (D. Ore. 1985) 6

Raffaele v. Compagnie Generale Maritime, S.A., 707 F.2d 395 (9th Cir. 1983) 7

Texas Trading v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982) 11

Ward v. Baltimore Stevedoring Co., 437 F.Supp. 941 (E.D. Pa. 1977) 7

Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406 (9th Cir. 1977) 12, 13

STATUTES AND RULES

42 Pa. C.S.A. §5322 1
Fed. R. Civ. P. 12(b)(2) 1
Supreme Court Rule 17.1(a) 5
Supreme Court Rule 17.1(c) 2, 10

COUNTERSTATEMENT OF THE CASE

The Petitioner, THOMAS BIELICKI, was allegedly injured while loading cargo aboard the M/V MALAKAND while the vessel was docked in the port of Philadelphia, Pennsylvania. Bielicki filed a Complaint against PAKISTAN NATIONAL SHIPPING CORPORATION (hereinafter PAKISTAN), the owner of the vessel, and EMPIRE STEVEDORING CO., LTD., (hereinafter EMPIRE), the stevedore which loaded certain cargo aboard the M/V MALAKAND in Montreal, Quebec. Bielicki alleged that PAKISTAN's breach of duty to insure the safety of the vessel and EMPIRE's negligence in loading the cargo caused his injuries. Respondent EMPIRE herein addresses only Issue I of Petitioner's Petition for Writ of Certiorari because Issue II concerns only Respondent Pakistan National Shipping Corporation.

At the conclusion of the trial, the District Court for the Eastern District of Pennsylvania granted EMPIRE's Motion under Fed. R. Civ. P. 12(b)(2) to dismiss for lack of personal jurisdiction. The court determined that service of process under the Pennsylvania long-arm statute, 42 Pa. C.S.A. §5322, did not reach EMPIRE since the stevedoring company was not doing business in the Commonwealth of Pennsylvania and did not have sufficient minimum contacts with Pennsylvania to support the exercise of personal jurisdiction. *See*, Petitioner's Petition for Writ of Certiorari, Appendix p. A-25.

On appeal, the Court of Appeals for the Third Circuit held that Bielicki failed to set forth sufficient facts to demonstrate the minimum contacts necessary to support personal jurisdiction over EMPIRE. The Court stated that Bielicki offered no facts supporting his assertion that EMPIRE had a reasonable expectation that its activities would subject it to suit in Pennsylvania. *See*, Petitioner's Petition for Writ of Certiorari, Appendix p. A-7. Accordingly, the judgment of the District Court dismissing the

complaint against EMPIRE for lack of personal jurisdiction was affirmed by the Court of Appeals for the Third Circuit. *See*, Petitioner's Petition for Writ of Certiorari, Appendix p. A-12.

ARGUMENT

I. THE UNITED STATES SUPREME COURT SHOULD NOT GRANT THE PETITION FOR WRIT OF CERTIORARI BECAUSE THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA AND THE AFFIRMANCE OF THAT DECISION BY THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ARE IN ACCORD WITH THE UNITED STATES SUPREME COURT DECISION IN *ASAHI METAL INDUSTRY CO., LTD. V. SUPERIOR COURT OF CALIFORNIA, SOLANO COUNTY.*

Respondent EMPIRE herein addresses only Issue I of Petitioner's Petition for Writ of Certiorari because Issue II concerns only Respondent Pakistan National Shipping Corporation, and respectfully submits that this Honorable Court should deny the Petition for Writ of Certiorari. United States Supreme Court Rule 17.1(c) provides for Supreme Court review on Writ of Certiorari when a Federal Court of Appeals ". . . has decided a federal question in a way in conflict with applicable decisions of this Court." However, the United States Court of Appeals for the Third Circuit held in favor of Respondent EMPIRE in accord with this Honorable Court's decision in *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County,* 480 U.S. 102 (1987). Therefore, the precedent set in *Asahi Metal Industry* was followed by the Court of Appeals for the Third Circuit and this precludes review on Writ of Certiorari by this Honorable Court.

The Petitioners argue that, "[j]urisdiction exists over EMPIRE by virtue of its negligence in loading the vessel in Montreal, creating a dangerous condition which would pose a substantial risk to all longshoremen who would be required to enter the hold, coupled with its *knowledge* that the vessel would be stopping for additional cargo, and the *reasonable inference* that it would stop at American ports after leaving Montreal for such purposes." (emphasis added) (Petitioners' Petition for Writ of Certiorari, p. 11-12). However, the United States Court of Appeals for the Third Circuit held in the instant case, "[i]n sum, Bielicki has offered no facts for his assertion that Empire had a reasonable expectation that its activities would subject it to suit in Pennsylvania, which is the crucial test we set forth in *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981)." *Bielicki v. Pakistan National Shipping Corp. and Empire Stevedoring Co., Ltd.*, No. 88-1203 (3d Cir. Memorandum of 8/26/88, Mansmann, J.) (Petition for Writ of Certiorari, p. A-7)

This Honorable Court addressed the question of:

> . . . whether the mere awareness on the part of a foreign defendant that the component it manufactured, sold, and delivered outside the United States would reach the forum state in the stream of commerce constitutes 'minimum contacts' between the defendant and the forum state such that the exercise of jurisdiction "does not offend 'traditional notions of fair play and substantial justice' ". *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

in *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 105 (1987).

This Honorable Court, in holding that the exercise of personal jurisdiction over Asahi (a Japanese corporation) by the Superior Court of California exceeded the limits of Due Process, stated:

> The "substantial connection," *Burger King*, 471 U.S., at 475; *McGee*, 355 U.S. at 223, between the defendant and the forum state necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed to the forum State. Burger King, supra.* 471 U.S., at 476; *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984). The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum state. Additional conduct of the Defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum state. But, a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State. (emphasis in original).

Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County, 480 U.S. 102, 112 (1987).

The Petitioners in the instant case argue an issue which was raised and decided by the United States Supreme Court in *Asahi Metal Industry*. Both the United States District Court for the Eastern District of Pennsylvania and the United States Court of Appeals for the Third Circuit concluded that Bielicki did not set forth sufficient facts to demonstrate minimum contacts with the forum to support the exercise of personal jurisdiction over EMPIRE. The Court of Appeals for the Third Circuit stated that:

> In this case, Empire loaded someone else's goods aboard the M/V MALAKAND while it was docked in Montreal. The vessel and its cargo were destined for Africa and Pakistan, but it made a stop in Philadelphia. Viewing the fact in a light most favorable to Bielicki, the record shows at best that some employees of Empire may have been aware that the vessel would load additional cargo at some subsequent

> port of call. Bielicki directs our attention to only one direct contact that Empire had with Pennsylvania; the vessel upon which Empire loaded the cargo was eventually docked in Philadelphia when Bielicki was injured. This contact is not sufficient to support the exercise of personal jurisdiction over Empire; a contrary finding would run in contravention to the traditional notions of fair play and substantial justice as set forth in *Asahi Metal Industry*, 480 U.S. 102 at 111.

Bielicki v. Pakistan National Shipping Corp., No. 88-1203, Petitioner's Petition for Writ of Certiorari, Appendix pp. A-8, A-9.

Therefore, this Honorable Court should deny the Petition for Writ of Certiorari because the Court of Appeals for the Third Circuit decision does not conflict with the holding in *Asahi Metal Industry.*

II. THE UNITED STATES SUPREME COURT SHOULD NOT GRANT THE PETITION FOR WRIT OF CERTIORARI BECAUSE THERE IS NO REAL CONFLICT BETWEEN THE COURT OF APPEALS FOR THE THIRD CIRCUIT AND THE COURT OF APPEALS FOR THE NINTH CIRCUIT PRESENTED BY THE FACTS OF THE INSTANT CASE, AND ACCORDINGLY NO BASIS FOR UNITED STATES SUPREME COURT JURISDICTION EXISTS.

United States Supreme Court Rule 17.1(a) provides for Supreme Court review on Writ of Certiorari when ". . . a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter. . ." Petitioners assert that certiorari should be granted by this Honorable Court to resolve the conflicting jurisdictional analyses of the Court of Appeals for the Ninth Circuit and the Court of Appeals for the Third Circuit on the matter of minimum contacts requirements necessary to assert personal jurisdiction over a foreign

Defendant. Respondent EMPIRE submits that the instant case is distinguishable from the Ninth Circuit cases and would be decided consistently whether in the Third or Ninth Circuits. Therefore, there is no real conflict between the Circuits and accordingly no basis for United States Supreme Court jurisdiction exists.

Petitioners argue that jurisdiction over EMPIRE would exist under the Ninth Circuit case of *Hedrick v. Daiko Shoji Co., Ltd.*, 715 F.2d 1355 (9th Cir., 1983). In *Hedrick*, the Court affirmed the District Court's exercise of personal jurisdiction over a defendant who performed a forum-related act by producing a splice that it *knew* was destined for ocean-going vessels serving United States ports. The Court stated that, "[t]he splice caused an injury to Hedrick in a port that was within the expected service area of Daiko's customers. . . . The probability that the part sold to an ocean carrier will be used in a foreign port is not fortuitous. It is certain." *Id.* at 1358.

Petitioners also cite the decision in *Peters v. Titan Navigation Co.*, 1985 A.M.C. 2249 (D. Ore. 1985), where the Court exercised jurisdiction over a defendant who allegedly was negligent in installing the vessel's hydraulic system during conversion, which resulted in injury to the plaintiff. However, the Court held that, "[i]t was foreseeable that a dry bulk carrier, registered as an American ship, would visit American ports . . . It is reasonable to believe that the defendants would 'reasonably anticipate being haled into court there.' " *Id.* at 2255.

The Courts in *Hedrick* and *Peters*, although pointing out the foreseeability of defendants being haled into Court in the applicable forum, also rely on the certainty of the risk created by defendants. However, both of those cases involved a products liability situation. In *Hedrick*, the defendants spliced a wire pendant that failed, causing injury to the plaintiff. Defendant supplied a defective product which it knew would enter the stream of foreign commerce. In

Peters, although defendant was the negligent installer of a product, that negligent installation travelled with the vessel permanently, until it eventually caused injury on board the vessel.

This products liability/stream of commerce analysis is inapplicable in the instant case. The stevedoring activities of EMPIRE constitute a provision of services rather than the introduction of goods into a world market. The United States District Court for the Eastern District of Pennsylvania has previously addressed the products liability/provision of services distinction as follows:

> . . . while it is quite reasonable from both a due process and policy standpoint to subject a non-resident manufacturer, importer or distributor to jurisdiction wherever its products may cause harm, since to do so encourages those with a substantial interest in a product to be responsible for its safety, nevertheless, this justification is absent in the case of a freight forwarder, who has no interest in the product other than to perform the purely ministerial task of arranging for its movement from one location to another.

Ward v. Baltimore Stevedoring Co., 437 F.Supp. 941, 944 (E.D. Pa. 1977).

Petitioners also cite the Court of Appeals for the Ninth Circuit decision in *Raffaele v. Compagnie Generale Maritime S.A.*, 707 F.2d 395 (9th Cir. 1983), which is also distinguishable from the instant case. In *Raffaele*, the Court asserted personal jurisdiction over a defendant in Oregon because the Court held that the defendant purposefully availed itself of the benefits and protections of Oregon's law by previously loading ninety-four containers destined for Oregon.

The case law in the Third Circuit is very clear as to the level of knowledge necessary to assert a defendant's reasonable expectation of being haled before a Court in the forum state, sufficient to sustain personal jurisdiction over that

defendant. In *DeJames v. Magnificence Carriers Inc.*, 654 F.2d 280 (3d Cir. 1981), *cert. denied*, 454 U.S. 1085 (1981), the Court of Appeals for the Third Circuit held that the benefit the defendant Japanese Shipyard derived from the ability of the vessel it had converted to dock in New Jersey was insufficient to assert personal jurisdiction over that Japanese corporation in a longshoreman's suit for injuries sustained aboard the vessel. In discussing the requisite minimum contacts for asserting personal jurisdiction the Court stated that, "[s]tanding alone, the fact that the defendant could foresee that its conduct might affect the forum state, or that its product might find its way into the forum state, is too attenuated to constitute such a 'reasonable expectation' ". *DeJames*, 654 F.2d at 284. The Court further held that:

> . . . initially we must focus on the defendant's conduct to determine whether the nature of this conduct can be said to have put the defendant on notice that it may be called to defend its action in the forum state. We do not believe that the conversion work performed by Hitachi in Japan constitutes this kind of conduct. It is true that Hitachi could have foreseen that a ship of this size was capable of transporting cars to any port in the world. However, the Supreme Court put to rest the notion in *World-Wide Volkswagen* that this kind of foreseeability alone is a sufficient basis for personal jurisdiction under the due process clause.

DeJames, 654 F.2d at 286.

Petitioners cite two other cases which allegedly support the application of personal jurisdiction, both of which are distinguishable from the instant case. First, in *Muller v. Temura Shipping Company, Ltd.*, 629 F.Supp. 1024 (E.D. Pa. 1986),[1] the Court held that a British Stevedoring Com-

---

1. It should be noted that the Court of Appeals for the Third Circuit never had the opportunity to consider the jurisdictional issue in *Muller* because the case was settled before trial and there was no appeal.

pany which loaded cargo on board a ship in a United Kingdom port *knowing* that the cargo would be unloaded in Philadelphia had sufficient minimum contacts with Pennsylvania to establish the District Court's personal jurisdiction over that defendant. The Court in *Muller* distinguished its case from the situation in *DeJames*, reinforcing the fact that purported foreseeability alone (as in the instant matter) is an insufficient basis for the exercise of personal jurisdiction over a foreign defendant. Further, the Court in *Muller* made the distinction that the defendant, in addition to knowing that the cargo it loaded would be discharged in Pennsylvania, had loaded Pennsylvania-bound ships on nineteen other occasions. Therefore, where the defendant in *Muller* arguably could have reasonably anticipated being haled into Court in Pennsylvania, EMPIRE in the instant case had no such knowledge upon which such expectation could be premised.

Friend v. Internor Trade Inc., C.A. No. 86-4073 (E.D. Pa. Memorandum of 3/13/87, Ludwig, J.) (available March 16, 1987, on LEXIS, Genfed library, Dist. file) can also be distinguished because the exercise of personal jurisdiction was found to be appropriate there because the defendant specifically knew on the occasion at issue and other occasions that it was loading cargo *to be discharged* in Pennsylvania.

The Petitioners' argument that the Court of Appeals for the Third and Ninth Circuits are in conflict as to the issue of minimum contact requirements is without merit in the case at hand. The facts in the instant case are distinguishable from the cases from the Court of Appeals for the Ninth Circuit in which personal jurisdiction over a foreign defendant was upheld, and are clearly consistent with the holding of the Court of Appeals for the Third Circuit in *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280 (3d Cir.) *cert. denied*, 454 U.S. 1085 (1981). Therefore, this Honorable Court should not grant the Petition for Writ of Cer-

tiorari because this case does not present facts showing a real conflict between the Court of Appeals for the Third and Ninth Circuits.

III. THE UNITED STATES SUPREME COURT SHOULD NOT GRANT THE PETITION FOR WRIT OF CERTIORARI BECAUSE THE UNRESOLVED QUESTION OF WHETHER NATIONAL CONTACTS MAY SUSTAIN PERSONAL JURISDICTION OVER A FOREIGN DEFENDANT MAY ONLY BE RECTIFIED BY CONGRESSIONAL AUTHORIZATION OF NATIONWIDE SERVICE OF PROCESS AND THERE IS NO SUCH STATUTE TO BE CONSTRUED BY THIS HONORABLE COURT.

United States Supreme Court Rule 17.1(c) provides for Supreme Court review on Writ of Certiorari when ". . . a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court . . ." Petitioners argue that a number of federal courts have adopted the thesis that because minimum Fifth Amendment due process standards apply in federal question cases, that minimum contacts with the United States as a whole rather than the state in which the District Court is sitting should be considered.[2] Petitioners assert that since the instant suit involves a maritime tort under the admiralty power of the federal courts, this Honorable Court should grant certiorari to resolve the "unresolved" question of whether the aggregate of national contacts should be considered to support personal jurisdiction over a foreign defendant.

---

2. This theory is sometimes referred to as the "aggregate contacts" theory.

Petitioners cite two Circuit Court decisions in support of the "aggregate contacts" theory. The Court of Appeals for the Fifth Circuit, in *Federal Trade Commission v. Jim Walter Corp.*, 651 F.2d 251 (5th Cir. 1981), held that the District Court had personal jurisdiction over a foreign corporation due to the fact that nationwide service of process was implicitly authorized under the Federal Trade Commission Act. In *Texas Trading v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982), the Court of Appeals for the Second Circuit held that the relevant area in delineating contacts was the entire United States due to the fact that service was made under §1608 of the Foreign Sovereign Immunities Act.

As the Court of Appeals for the Third Circuit stated in the instant case:

> We rejected the "aggregate contacts" theory in *Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290, 297 (3d Cir. 1985), because of the absence of a federal statute authorizing the exercise of personal jurisdiction.
>
> Noting the rationale of *Daetwyler*, we conclude that in the absence of a provision in the admiralty law authorizing nationwide service of process, the district court's power to exercise in personam jurisdiction is limited by Fed. R. Civ. P. 4(e), which authorizes application of the forum state's long arm statute. We have already determined that personal jurisdiction cannot be obtained over Empire under the appropriate Pennsylvania statute. Thus, no personal jurisdiction exists despite the presence of an independent federal question.

Bielicki v. Pakistan National Shipping, No. 88-1203 3d Cir., Petitioner's Petition for Writ of Certiorari, Appendix pp. A-9, A-10.

In *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 286 (3d Cir. 1981), the Court of Appeals for the Third Circuit held that since "Congress has not authorized nationwide service of process, a federal district court's power to

require a defendant to submit to its jurisdiction is limited by the Federal Rules of Civil Procedure, and through them by the long-arm rule of the state in which it sits." The Court went on to state that, "even in non-diversity cases, if service of process must be made pursuant to a state long-arm statute or rule of Court, the defendant's amenability to suit in federal district court is limited by that statute or rule." *Id.* at 283. Therefore, even under federal admiralty jurisdiction, EMPIRE must have the requisite minimum contacts with the forum state before being subject to personal jurisdiction.

The Court of Appeals for the Third Circuit in *DeJames* stated in dictum that:

> The anomaly of a federal court being limited by the requirements of the fourteenth amendment in a nondiversity case where service must be made pursuant to a state long-arm rule could be easily rectified by congressional authorization of nationwide service of process for admiralty cases. It is not within our province to create such authorization.

DeJames, 654 F.2d at 284.

The Court of Appeals for the Third Circuit reaffirmed the position in *DeJames* four years later by holding that because "in the absence of a governing federal statute, we have found no authority for exercising personal jurisdiction over Meyer on the basis of his contacts with states other than Pennsylvania, *we reject the national contacts theory* on which the district court predicated its jurisdiction." (emphasis added). *Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290, 297 (3d Cir. 1985). The Court of Appeals for the Ninth Circuit, in declining to recognize the aggregate contacts theory, previously stated:

> If policy considerations do indeed dictate that an alien defendant's contacts with the entire United States should be aggregated, and if the Constitution does not forbid such a practice — at least where the plaintiff is suing in federal

> court on a federal cause of action, the Federal Rules should be amended to authorize such a practice. *Such a step is, however, not ours to take.* (emphasis added)

Wells Fargo & Company v. Wells Fargo Express Company, 556 F.2d 406, at 418 (9th Cir. 1977).

There is no federal statute under which personal jurisdiction is asserted to be construed in this case and accordingly the statement by this Honorable Court, in a footnote in *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 113 (1987), that "[w]e have no occasion here to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts, rather than on the contacts between the defendant and the State in which the federal court sits (citations omitted) . . ." applies, and therefore, the Petition for Writ of Certiorari should be denied.

CONCLUSION

The Petition for Writ of Certiorari should be denied because:

(1) the decision of the United States District Court for the Eastern District of Pennsylvania and the affirmance of that decision by the United States Court of Appeals for the Third Circuit are in accord with the United States Supreme Court decision in *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*;

(2) there is no real conflict between the Court of Appeals for the Third Circuit and the Court of Appeals for the Ninth Circuit presented by the facts of the instant case; and

(3) the unresolved question of whether national contacts may sustain personal jurisdiction over a foreign defendant may only be rectified by Congressional authorization of nationwide service process and there is no such statute to be construed by this Honorable Court.

WHEREFORE, Respondent EMPIRE STEVEDORING COMPANY, LTD. prays that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

*THOMAS E. SEUS, ESQUIRE
KELLY, HARRINGTON,
McLAUGHLIN & FOSTER
1700 Atlantic Building
260 South Broad Street
Philadelphia, PA 19102
(215) 790-7900

Attorney for Respondent,
Empire Stevedoring Company, Ltd.

*Member of the Bar of the Supreme Court of the United States.